Office - Supreme Court, U.S.
FILED
JAN 18 1984
ALEXANDER L. STEVAS,
CLERK

83-1187

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

ITT LIGHTING FIXTURES, INC. DIVISION OF ITT CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JORDAN ROSSEN
General Counsel, UAW
LEONARD R. PAGE
Associate General Counsel, UAW
8000 East Jefferson Avenue
Detroit, MI 48214

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)

Of Counsel:
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does noncoercive pro-union activity by minor supervisors during a representation campaign constitute an adequate ground for overturning the result of an election conducted by the National Labor Relations Board.?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
Fall River Sav. Bank v. N.L.R.B., 649 F.2d 50 (C.A. 1, 1981)	7-8
Hecla Min. Co. v. N.L.R.B., 564 F.2d 309 (C.A. 9, 1977)	12
Iron Workers v. Perko, 373 U.S. 701 (1963)	11
ITT Lighting Fixtures, 261 NLRB 229 (1982), enforced in part, reversed in part, 719 F.2d 851 (C.A. 6, 1983)	13
Marine Engineers v. Interlake Co., 370 U.S. 172 (1962)	11
Medical Center at Bowling Green v. N.L.R.B., 712 F.2d 1091 (C.A. 6, 1983)	9
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)	12
N.L.R.B. v. Howard Johnson Motor Lodge, 705 F.2d 923 (C.A. 7, 1983)	9
N.L.R.B. v. Kingler Elec. Corp., 656 F.2d 76 (C.A. 5, 1981)	8
N.L.R.B. v. Manufacturer's Packing Co., Inc., 645 F.2d 223 (C.A. 4, 1981)	9-10
N.L.R.B. v. Northeastern University, 707 F.2d 15 (C.A. 1, 1983)	8
N.L.R.B. v. San Antonio Portland Cement Co., 611 F.2d 1148 (C.A. 5, 1980), *cert. denied*, 449 U.S. 884 (1980)	8, 9
N.L.R.B. v. Security Guard Service, Inc., 384 F.2d 143 (C.A. 5, 1967)	12
N.L.R.B. v. St. Mary's Home, Inc., 690 F.2d 1062 n.13 (C.A. 4, 1982)	11
N.L.R.B. v. Swift & Co., 292 F.2d 561 (C.A. 1, 1961)	11
N.L.R.B. v. Wehrenberg Theatres, Inc., 690 F.2d 159 (C.A. 8, 1982)	9
Turner's Express v. N.L.R.B., 456 F.2d 289 (C.A. 4, 1972)	8, 9, 10
Worley Mills, Inc. v. N.L.R.B., 685 F.2d 362 (C.A. 10, 1982)	9

TABLE OF AUTHORITIES—Continued

Statutes	Page
National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*:	
§ 2(3)	2
§ 2(11)	2
§ 8(a)(1)	3
§ 8(a)(5)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

ITT LIGHTING FIXTURES, INC. DIVISION OF ITT CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit herein are reported at 712 F.2d 40 and 658 F.2d 934 and are reproduced in the separately bound appendix ("App.") at pp. 1a-9a and 10a-30a respectively. The decisions of the National Labor Relations

Board herein are reported at 265 NLRB No. 188, 252 NLRB 328 and 249 NLRB 449 and are reproduced at App. 31a-50a, 51a-62a and 63a-68a respectively.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 18, 1983. App. 1a. The Union's timely petition for rehearing *en banc* was denied on September 20, 1983. App. 69a-70a. On December 12, 1983, Justice Marshall entered an order extending the time to file a petition for a writ of certiorari to and including January 18, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The International Union, UAW, filed a petition with Region 26 of the National Labor Relations Board for a representation election among the employees working at ITT Lighting Fixtures Inc.'s facilities in Southaven, Mississippi, and in Memphis, Tennessee. The election was conducted on February 16, 1979, and the UAW was chosen by a majority of the employees to be the bargaining representative (UAW—175 votes, No Union—153 votes, challenged ballots—34). See App. 63a.

The votes of thirty-one group leaders were challenged by ITT on the ground that the group leaders were "supervisors" within the meaning of § 2(11) of the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, rather than "employees" within the meaning of § 2(3) of the Act, and ITT objected to the election results on the ground that the group leaders' pro-union activity impermissibly interfered with the employees' free choice. (The same group leaders had voted in two prior NLRB elections without challenge and were listed as employees on the list of eligible voters submitted to the Board by ITT in those elections. The Company's President testified in this case, moreover, that the group leaders' duties had not been changed in the interim.) See App. 63a-64a.

An NLRB hearing officer recommended that ITT's challenges to the eligibility of the thirty-one group leaders should be sustained, but that ITT's objections to the election should be overruled. The hearing officer concluded that these individuals were supervisors but that they had only very limited supervisory authority and that their participation in the Union's campaign was therefore insufficient to taint the election. Then the NLRB's Regional Director sustained ITT's challenges to only eleven of the thirty-one group leaders, ruling with respect to the remaining twenty that the evidence of supervisory status was either insufficient or contradictory. The Director concluded further that no decision need be made on the remaining twenty challenges because those ballots could not affect the outcome of the election. The Director further adopted the hearing officer's findings that, assuming their supervisory status, the group leaders were "minor" supervisors—*viz.*, supervisors who do not have the authority in the interest of their employees to hire, fire, suspend, lay-off, recall, promote, discharge, reward or discipline employees on their own volition—and that their involvement in the representation campaign in this case did not constitute objectionable conduct warranting the setting aside of the election results. The Director therefore certified the UAW as the employees' representative. See App. 64a-65a.

The Board granted ITT's request for review of the Regional Director's decision only insofar as that decision did not settle the status of twenty of the group leaders. In its decision on review, the Board found that four group leaders, in addition to the eleven leaders already found by the Director to be supervisors, should be so classified. The Board left unresolved the supervisory status of the remaining group leaders in light of the closeness of the question and the lack of effect of determining their status on the outcome of the election. The Board further found that, even assuming that all the group leaders were statutory supervisors, the leaders had

not engaged in any conduct that would warrant setting aside the election. The Board, therefore, certified the Union. See App. 65a-68a.

ITT continued to refuse to bargain with the UAW and the Union responded by filing unfair labor charges alleging that ITT was violating §§ 8(a)(5)&(1) of the NLRA by failing to recognize and bargain with the duly certified representative of the Company's employees. The Board concluded that ITT had engaged in an unlawful refusal to bargain. App. 56a-60a. ITT sought review of the Board's decisions before the United States Court of Appeals for the Second Circuit, and the Board cross-petitioned for enforcement. The Second Circuit refused to enforce the Board's order and remanded the matter to the Board for further findings on the supervisory status of the group leaders and on whether their pro-union activity unlawfully affected the votes of the employees. App. 22a-30a.

After reviewing the entire record in the underlying representation proceedings, as well as the UAW's and ITT's statements of position, the Board on remand reaffirmed its certification of the Union. App. 32a. In its supplemental decision, the Board examined the job functions and authority of each of the fifteen group leaders who engaged in pro-union activity. (The parties stipulated that sixteen of the thirty-one group leaders in question did not engage in any union activity, and, therefore, they were not the subject of inquiry on remand.) After its examination, the Board found that thirteen of the fifteen group leaders who engaged in union activity during the organizing effort were supervisors. With reference to these thirteen group leaders, the Board concluded:

> All thirteen of these individuals exercised independent judgment in assigning and directing work; seven had the authority to allow employees to leave work early and to approve overtime; and four could ad-

> just grievances. None of these group leaders had the authority effectively to recommend hiring, firing, promotions or written warnings. The most they could do was orally reprimand an employee and inform a foreman that an employee had committed an infraction or need to improve his job performance. As mentioned above, these oral warnings were not recorded. [App. 48a.]

The Board did *not* find that any of the thirteen group leaders had engaged in any coercive or otherwise unlawful conduct toward eligible voters. Instead, *some* of the thirteen group leaders were found to have engaged in one or more of the following types of pro-union conduct:

1) serving on the in-plant organizing committee;

2) urging others to vote for the UAW;

3) soliciting UAW authorization cards;

4) attending UAW meetings;

5) wearing UAW shirts and insignia.

See App. 37a-48a.

The Board concluded that in light of the group leaders' limited authority there was no "warrant [for] finding that the retaliatory potential of the group leaders was sufficient to make their involvement in the union campaign coercive to employees" and affirmed its "earlier holding that the pro-union statements of the group leaders did not reasonably tend to coerce employees and impair the employees' freedom of choice so as to justify setting the election aside." App. 49a.

Again, ITT sought review of the Board's decision before the United States Court of Appeals for the Second Circuit, the Board cross-petitioned for enforcement, and the UAW intervened as a party. And again the Second Circuit reversed the Board. That court stated that "The question is whether * * * the 15 group leaders whose status as supervisors is conceded * * * might have affected the result because of the nature of their authority and

the extent of their union activity." App. 8a. The totality of its basis for answering that question "yes" is the following:

> The testimony shows that Massey, McNeely, Millington and Barry Williams supervised a total of 31 employees and possessed more than minimal authority to reward employees. They encouraged employees to support their pro-union position. • • •
>
> Joan Carson was a groupleader of 20 employees. She had authority to select employees for overtime. • • • Carson could issue oral warnings. Her supervisor said he would issue a written warning on her recommendation, but would first check the employee's file to see if Carson had issued an oral warning. • • •
>
> On this record it has been shown that 51 employees could possibly have been influenced by the pro-union activity of five of the groupleaders. Thus, we cannot say that the election was held in an atmosphere "free not only from interference, restraint, coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice." *ITT Lighting Fixtures*, 658 F.2d at 936, quoting *Sewell Manufacturing Company*, 138 N.L.R.B. 66, 70 (1963). [App. 8a-9a.]

REASONS FOR GRANTING THE WRIT

1. There is a clear conflict between the circuits on the standard for determining whether noncoercive pro-union activity by supervisors during a representation campaign is a basis for setting aside a National Labor Relations Board election. This is a recurring question, as the number of courts of appeals which have spoken to the issue since 1980 demonstrates. See pp. 7-11 *infra*. Moreover, the question is of unusual practical importance in the administration of the National Labor Relations Act because that Act does not draw a bright line between "employees" and "minor supervisors." See p. 11 *infra*. Un-

der the decision below, individuals who have campaigned for the union in a noncoercive manner, and in the evident belief that they are "employees" whom the Act encourages to take an active part in representation campaigns, invalidate an election in which the union has prevailed if it is determined after lengthy litigation that, even though it was not so understood at the time, those individuals are minor supervisors.

The present case aptly illustrates the mischief the Second Circuit's rule creates. ITT has successfully contested the election on the basis of noncoercive activities, no diflerent from those engaged in by any union supporter, of individuals whom the employer had treated as "employees" in two prior elections. In any such election if individuals on the borderline between "employee" and "supervisor" simply encourage a significant number of their fellows to support the union, and if the employer shows that those indiivduals are "minor supervisors," the result, under the Second Circuit rule, is that, without more, the election is set aside.

2. The Second Circuit held in this case that an NLRB representation election is invalid if pro-union activity—which does not encompass express or tacit threats or promises of benefit—of minor supervisors "could possibly have * * * influenced" employees whose votes were sufficient to affect the outcome of the election. App. 9a. This ruling conflicts with the decisions in several other circuits.

The prevailing rule is that stated by the First Circuit:

> It is clear that certain supervisors favored the Union, and that employees knew this; but without evidence of any threats, express or implied, this does not compel a finding of coercion. * * * Here there were no significant evidence of threats, and none that any employee feared retaliation; those employees who were asked about such fears stated that they

> had none. [*Fall River Sav. Bank v. N.L.R.B.*, 649 F.2d 50, 57 (C.A. 1, 1981), footnotes omitted.] [1]

See also, N.L.R.B. v. Northeastern University, 707 F.2d 15, 18 (C.A. 1, 1983) (contrasting the First Circuit's position with that of the Second Circuit as expressed in its initial opinion in this case.)

The Fifth Circuit law is in accord with that of the First Circuit. In *N.L.R.B. v. Klingler Elec. Corp.*, 656 F.2d 76, 86 (C.A. 5, 1981), that court reaffirmed its prior decisions which held that:

> [P]ro-union activities by supervisors are merely an expression of personal preference and are not enough, by themselves, to invalidate an election. *NLRB v. Alamo Express, Inc.*, 430 F.2d 1032, 1035 (5th Cir., 1970), *cert. denied*, 400 U.S. 1021, 91 S.Ct. 584, 27 L.Ed.2d 633 (1971). Klinger must show that the activities created an environment of tension or coercion such as to preclude employees from exercising a free choice. * * * *Singleton Packing*, 418 F.2d at 281 (quoting *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir., 1965.)

So, too, in *N.L.R.B. v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (C.A. 5, 1980), *cert. denied*, 449 U.S. 844 (1980), that court stated:

> This Circuit has clearly held that not just any advocacy of a union by a supervisor rise to the level of [objectionable] supervisory pressure or coercion. The mere statement of personal preference by a supervisor is not coercive. * * * There is no supervisory taint so long as nothing in the words, deeds, or atmosphere of a supervisor's [pro-union communica-

---

[1] The First Circuit contrasted the Fourth Circuit decision in *Turner's Express v. NLRB*, 456 F.2d 289 (C.A. 4, 1972) where the foremen warned employees that they would "get tough" if the union lost, and that anti-union employees would "pay for it." See pp. 9-10, *infra*.

> tion] contains the seeds of potential reprisal, punishment or intimidation.[2]

Likewise, the Tenth Circuit has held: "Supervisory involvement in an election campaign is not per se a reason to invalidate an election." *Worley Mills, Inc. v. N.L.R.B.*, 685 F.2d 362, 365 (C.A. 10, 1982):

> Such pro-union activities are no more than an expression of personal preference. Standing alone they do not taint an otherwise valid election. *NLRB v. Alamo Express, Inc.*, 430 F.2d 1032, 1035 (5th Cir., 1970), *cert. denied*, 400 U.S. 1021, 91 S.Ct. 584, 27 L.Ed. 633 (1971). Where supervisors exhibit pro-union activity and employees are aware of this, the election will be tainted only upon a showing of threats, either expressed or implied, that result in the employees' fear of retaliation. *Fall River Savings Bank v. NLRB*, 649 F.2d 50, 57 (1st Cir., 1981). There must have been created an environment of tension which precluded employees from exercising free choice at the polls. *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir., 1965). See *NLRB v. Klingler Electric Corp.*, 656 F.2d 76, 86 (5th Cir., 1981). [685 F.2d at 365.]

While there is language in earlier Fourth Circuit decisions that would support the approach of the Second Circuit in this case, that court has more recently approved the Fifth Circuit rule as set out in *San Antonio Portland Cement Co., supra* (quoted above). In *Turner's Express, Inc. v. N.L.R.B., supra*, the Fourth Circuit, reversing the Board, set aside an election because two supervisors had been very active in support of the union. See 456 F.2d at 292.[3] But in *N.L.R.B. v.*

---

[2] See also *Medical Center at Bowling Green v. N.L.R.B.*, 712 F.2d 1091, 1094 (C.A. 6, 1983); *N.L.R.B. v. Howard Johnson Motor Lodge*, 705 F.2d 932, 934 (C.A. 7, 1983); *N.L.R.B. v. Wehrenberg Theatres, Inc.*, 690 F.2d 159, 162 (C.A. 8, 1982).

[3] The Fourth Circuit majority said in *Turner's Express, Inc.*:

> The Board found that the activities of these supervisors were harmless because of the company's vigorous anti-union cam-

Manufacturer's Packing Co., Inc., 645 F.2d 223 (C.A. 4, 1981), the Fourth Circuit refused to "read *Turner's Express, Inc.* as establishing a per se rule invalidating a union election if there is any evidence of pro-union supervisory activity." *Id.* at 225-226. Instead, that court said that

> whether pro-union supervisory activity is sufficient to overturn an election depends on the facts and circumstances of each case. The critical inquiry is whether the supervisors' pro-union activities prevented employees from freely effectuating their collective choice. *Schneider Mills, Inc. v. NLRB*, 390 F.2d 375, 378 (4th Cir., 1968). Employees' free choice is stifled and an election may be set aside if the supervisors' activities "contain the seeds of potential reprisal, punishment or intimidation." *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir., 1980), citing *NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302, 1316 (5th Cir., 1973); *accord, Global Marine Development of California, Inc. v. NLRB*, 528 F.2d 92, 95 (9th Cir., 1975), *cert. denied*, 429 U.S. 821, 97 S.Ct. 70, 50 L.Ed.2d 83 (1976). The activities of the supervisors in *Turner's Express* were obviously egregious, and there is no doubt that they were pervasive, coercive, and upsetting to election conditions. [645 F.2d at 226.]

---

paign and the employees' knowledge of the president's strong opposition to unionization. This is also answered by *Heck's, supra*, 386 F.2d at page 322:

> "It is no answer that the company's anti-union position was abundantly known to employees . . . An employee properly could doubt his ability to obtain protection by appeals to higher company authority."

In industry an employee is more concerned about the attitude of his immediate supervisor than he is with the feelings of the company president. This is similar to the Army where a private is more concerned with the attitude of his corporal or sergeant than he is with the colonel or general, since the corporal and sergeant control his day to day life. [456 F.2d at 292-293.]

See also N.L.R.B. v. St. Mary's Home, Inc., 690 F.2d 1062, 1069 n.13 (C.A. 4, 1982) (quoting the foregoing passage as "the controlling rule".)

3. This Court has recognized that the "statutory definition of the term 'supervisor' has been the subject of considerable litigation before the NLRB and in the federal courts." *Marine Engineers v. Interlake Co.*, 370 U.S. 173, 179 (1962). The Court there quoted with approval the First Circuit's observation that:

> ". . . the gradations of authority 'responsibility to direct' the work of others from that of general manager or other top executive to 'straw boss' are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor.' " [370 U.S. at 179, n.6, quoting *N.L.R.B. v. Swift & Co.*, 292 F.2d 561, 563 (C.A. 1, 1961).] [4]

Given the closeness of the line between employees and supervisors a colorable argument that one or more of the union's supporters should be classified as a supervisor will frequently be available to employers who are dissatisfied with the results of a representation election. Indeed, as the cases just discussed show, employers are quick to make that argument, which at the least provides the benefits of a delay in bargaining and thereby weakens the union that has prevailed in the election. The decision below by watering down the standard for overturning an election will encourage employers who wish to defeat a union organizing effort to litigate the question of supervisory status in hundreds of cases annually

---

[4] See also *Iron Workers v. Perko*, 373 U.S. 701, 706 (1963) (question whether individual was supervisor "presents difficult problems of definition of status"); *N.L.R.B. v. Security Guard Services, Inc.*, 384 F.2d 143, 145 (C.A. 5, 1967) ("We have here for decision the aging but nevertheless persistently vexing problem of whether or not an employee is a supervisor.").

before the Board, and if that fails, before the courts of appeals.

4. Finally, the decision below both reveals and accentuates an unjustified and entirely unfair distinction between the rule on when pro-union supervisory activity is a basis for setting aside an election and the rule that an election will *not* be set aside on the basis of an employer's active noncoercive *anti-union* campaign, whether conducted by high management officials or by supervisors. See generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).[5]

The Board's election processes are designed to further employee freedom of choice rather than to favor or to disfavor a pro-union or an anti-union vote. The employees' freedom of choice may not be interfered with in either direction. Moreover, whether one accepts the Fourth Circuit's view that a supervisor would have greater impact on the employees whom he supervises than the company's president, or the Ninth Circuit's contrary view (see n.5 this page), it is indisputable that where the position on the desirability of union representation stated by top management and by supervisors coincides, the effect on the employees is greatest. Yet, although the law is that a noncoercive anti-union campaign conducted at all levels of the management hierarchy *is* permissible, the court below has set aside an election because of the noncoercive pro-union activities of five supervisors, in the course of

---

[5] Indeed, the Ninth Circuit has reversed the Board for setting aside an election because of *threatening* statements "made by low-level, marginal supervisors." *Hecla Min. Co. v. N.L.R.B.*, 564 F.2d 309, 315 (C.A. 9, 1977). That court observed that "such statements are more likely to express individual views and less likely to influence the employee's decision than statements by high-level officials which bear the imprint of company policy." *Id.* This view is diametrically opposed to that of the Fourth Circuit in *Turner's Express*, quoted at pp. 9-10, n.3, *supra*.

a campaign in which employer representatives vigorously communicated their opposition to the union.[6]

This double standard of review of election objections, depending on whether the supervisor is supporting or opposing the union, is wholly at odds with the NLRA's guarantee of a freedom to choose union representation as well as a freedom not to do so.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JORDAN ROSSEN
General Counsel, UAW
LEONARD R. PAGE
Associate General Counsel,
UAW
8000 East Jefferson Avenue
Detroit, MI 48214

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)

Of Counsel:
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

[6] The court below observed in its first opinion that "the Company here waged a vigorous campaign against the Union * * *." App. 15a. Indeed, in a related case the Company was found guilty of unfair labor practices against pro-union employees. *ITT Lighting Fixtures*, 261 NLRB 229 (1982), enforced in part, reversed in part, 719 F.2d 851 (C.A. 6, 1983). Moreover, the employees here were repeatedly informed that ITT would overrule *any* adverse actions by pro-union supervisors. The ITT Employee Handbook stated "If you feel you are being pressured into making a commitment to the union, notify the Management and *we will see that such pressure is stopped.*" (Emphasis supplied) ITT gave similar assurances in several pieces of its campaign literature distributed during the organizing drive and in a captive audience session the day before the election.